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**MERGERS, ACQUISITIONS & CORPORATE CONTROL
CONTESTS COMMITTEE**

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Srinivas Raju, Chair
James D. Honaker, Vice-Chair
Council of the Corporation Law Section
Delaware State Bar Association
704 N King St, Wilmington, DE 19801

Re: Proposed Amendments to the Delaware General Corporation Law

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Mergers, Acquisitions and Corporate Control Contests of the New York City Bar Association (the “Committee”). Our Committee is composed of experienced attorneys whose practices focus on merger and acquisition transactions and related corporate law, corporate governance and securities regulation matters. Our Committee includes lawyers with diverse perspectives on corporate and securities law issues, including partners at law firms and in-house counsel to companies, investors and financial advisors.

The Committee supports the proposed amendments (the “Amendments”) to the Delaware General Corporation Law (the “DGCL”) recently put forward by the Council of the Corporation Law Section of the Delaware State Bar Association (the “Council”). The Committee believes that the Amendments, if adopted, would provide clarity, certainty, and practicality in the law governing Delaware companies and

contracts in the M&A and corporate context. M&A practitioners have always looked to Delaware for consistent and pragmatic guidance that allows us and other practitioners around the country to appropriately advise corporations. The Committee views the Amendments as entirely consistent with that history. We elaborate some of our thinking below.

Stockholder Agreements

We recognize the primacy of the board of directors in the Delaware model of corporate governance. We believe that inherent in that model's allocation of rights and responsibilities is the authority of the board to determine which contracts are in the best interests of the corporation. The Committee thus views the draft Amendments designed to permit and confirm the validity of customary stockholder agreements as important for all Delaware companies. The Committee views the draft Amendments as particularly important for those companies planning to become public corporations and which need to establish orderly relationships with their existing stockholders, as well as those companies confronting potential disruptions from activists or other shareholders later in their life cycles. We welcome an affirmation that it is well within a board's business judgment to determine that it is to the corporation's benefit to avoid a protracted, expensive proxy contest or other dispute with a shareholder, even if doing so requires making certain concessions with respect to board composition or other corporate actions. The large number of existing agreements of this type is compelling evidence that the broader market clearly believed that a Delaware board already had the authority to enter into such agreements without specific authorization in the certificate of incorporation. In our view, the Amendments would provide clarity regarding the ability of a Delaware board to order the affairs of the company in a manner consistent with what practitioners have long believed to be appropriate.

Penalties for Merger Agreement Breach

The Committee applauds the move to clearly address in the Amendments the rights of contracting parties to allocate the risk for a failed merger transaction, including the risk of a lost premium. The ability of a party to receive the benefits of its bargain can be a fundamental element of the decision to enter into a merger agreement, and prohibiting this remedy introduces undesirable optionality for a counterparty. Delaware corporate law historically stands for certainty and intelligent alignment of incentives; we believe this portion of the Amendments is consistent with that overarching goal.

Board Approval Process

The proposed Amendments relating to the requirements for board adoption of documents including merger agreements are well considered, advisable and consistent with the historical Delaware corporate law principle of recognizing function over form. The Committee believes that the proposed Amendments would set workable guardrails permitting a practical and administrable board process,

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while still ensuring that a board is cognizant of all material terms of the transaction being considered at the time of approval. The Committee also endorses the associated provisions of the Amendments designed to permit the practical ratification of agreements and mailing of stockholder notices, without unwarranted burden or expense and while also permitting the necessary exchange of confidential disclosures between transaction parties.

* * *

The Committee expresses one note of concern regarding the Amendments. As drafted, the Amendments appropriately apply retroactively—that is, to agreements or other documents approved by a board regardless of whether an agreement or document was approved or entered into before the effective date of the Amendments. The draft Amendments, however, state as an exception that the Amendments “shall not apply to affect any civil action or proceeding . . . pending on or before” the effective date of the Amendments. We view this exception referring to pending proceedings as creating needless ambiguity and potentially inviting the initiation of litigation challenging agreements or other documents that are undoubtedly valid and appropriate under the Amendments. While we have no issue with the proposition that the Amendments should not provide a basis to reopen completed judicial proceedings, the exception for pending proceedings risks the arbitrary invalidation of agreements or other documents simply because litigation was pending on the effective date of the Amendments.

For the reasons discussed above, the Committee encourages the Council to advance the Amendments, and to take into consideration the concerns expressed regarding their retroactivity. If you have any questions regarding the foregoing, please do not hesitate to contact Iliana Ongun, Chair of the Committee on Mergers, Acquisitions and Corporate Control Contests, at (212) 530-5571 or iongun@milbank.com.

Respectfully submitted,

Iliana Ongun

Chair, Committee on Mergers, Acquisitions
and Corporate Control Contests